IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1439

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

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Dated: September 14, 1976.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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OPINIONS BELOW.

The United States Court of Appeals for the Eighth Circuit directed that its per curiam opinion not be printed or published. The opinion is reproduced in the Appendix, at A. 43-46. The Federal District Court for the Southern District of Iowa issued an unreported order denying a motion for a new trial. (A. 32-34.)

JURISDICTION.

The jurisdiction of the Iowa District Court was based on 18 U.S.C. § 3231. The jurisdiction of the Court of Appeals was founded upon 28 U.S.C. § 1291.

The judgment of the Court of Appeals was entered on February 13, 1976. A Petition for a Writ of Certiorari was filed on April 10, 1976, and granted on June 21, 1976. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Did the refusal of a federal court and jury to adopt the "contemporary community standards," consciously established by the Iowa Legislature, as the test for measuring "obscenity" in a prosecution under 18 U.S.C. § 1461 for a wholly *intra*-Iowa mailing of allegedly "obscene" materials ignore this Court's prior decisions and defy fundamental principles of our federalist system?

2. Did the Court of Appeals, in ruling that jurors can disregard the conscious determination of their state legislature to deregulate the distribution of sexually related matter to consenting adults in Iowa, render 18 U.S.C. § 1461 unconstitutionally vague as applied?

3. Did the District Court's refusal at *voir dire* to probe the prospective jurors' knowledge of the "contemporary community standards" in Iowa deny petitioner due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED.

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED.

Chapter 725 of the Iowa Code prohibits only the distribution of "obscenity" to minors. The statute is exclusive and expressly precludes any prosecution for the distribution of materials to adults. The statute provides in pertinent part:

> "725.9 Uniform Application. In order to provide for the uniform application of the provisions of Sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no municipality, county, or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances and regulations, whether enacted before or after said sections, shall be or become void, unenforceable and of no effect upon July 1, 1974." (A. 49-50.)

Chapter 725 of the Iowa Code is printed in its entirety in the Appendix, at A. 47-50.

The federal statute here at issue, 18 U.S.C. § 1461, provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made
>
> * * * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

> "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulation or disposing thereof, or aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

STATEMENT OF THE CASE.

In 1974, the Iowa Legislature eliminated all regulation of the distribution of sexually related materials to consenting adults. Iowa Code Ann. ch. 725. (A. 47-50.) Prohibition remained only on the distribution of certain materials to minors, and the Legislature expressly foreclosed any other prohibitions within the state. *Id.* § 725.9. (A. 49-50.)

On March 26, 1976, the United States Grand Jury for the Southern District of Iowa returned an Indictment charging the petitioner Jerry Lee Smith with seven violations of the federal statute prohibiting distributions of "obscene" materials through the United States mails, 18 U.S.C. § 1461. (A. 3-7.) The petitioner pleaded not guilty. He was tried by a jury which convicted him of each count of the Indictment on September 9, 1975. (A. 13.) On October 14, 1975, petitioner was sentenced to three years imprisonment. All but six months of this sentence were suspended, and the petitioner was placed on three years probation. (A. 35-36.)

The mailings for which petitioner was prosecuted were all wholly within Iowa. (A. 38-41.) These mailings were made to federal postal drop boxes at the written request of Iowa postal service inspectors using fictitious names. (A. 39.) No evidence was ever adduced that the materials were sent by petitioner to another state or were received or viewed by minors or non-soliciting adults. The mailings were, therefore, lawful under Iowa law.

Petitioner submitted proposed *voir dire* questions to the District Court designed to determine what, if any, knowledge prospective jurors had of the "contemporary community standards" controlling the alleged "obscenity" of the materials distributed. (A. 8.) The District Court refused to ask these questions or permit petitioner to make his own inquiries of the prospective jurors. (A. 38.)

The Government offered no evidence at trial of any "contemporary community standards" governing the "obscenity" of the materials involved; it simply introduced the materials themselves. (A. 38-39.) Petitioner's motion for acquittal at the conclusion of the Government's case was denied. (A. 41.)

In defense, petitioner placed in evidence a copy of Chapter 725 of the Iowa Code and established that materials comparable to those for which he was being prosecuted were lawfully available for over-the-counter purchase throughout Iowa. (A. 40-41.) At the close of the evidence, the District Court denied petitioner's renewed motion for acquittal, based on the claim that the appropriate "contemporary community standards" for measuring the "obscenity" of the materials were established by the Iowa Legislature in Chapter 725 of the Iowa Code. (A. 41.)

The District Court then instructed the jurors, in determining whether the materials distributed were "obscene," "to draw on your own knowledge of the views of the average person in the community," but left them free to disregard Chapter 725 of the Iowa Code and the lawful availability of comparable materials in their community. (A. 23.) Petitioner's prior objections to the proposed instruction and his request for a direction of acquittal based on the Iowa statute had been denied.

After the guilty verdict was returned, petitioner moved for a new trial (A. 29-30), but the motion was denied. (A. 32-34.) Petitioner then appealed the District Court's rulings to the Eighth Circuit Court of Appeals. (A. 37.) The Court of Appeals affirmed per curiam.[1] (A. 44-46.) Petitioner sought a Writ of Certiorari, which was granted by this Court on June 21, 1976.

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1. The Eighth Circuit Court of Appeals panel consisted of Mr. Justice Clark, Retired, sitting by designation, and Judges Bright and Henley.

SUMMARY OF THE ARGUMENT.

I.

This Court's prior decisions and our federalist system mandate reversal of petitioner Jerry Lee Smith's 18 U.S.C. § 1461 conviction for mailing allegedly "obscene" materials to consenting adults in Iowa. The Iowa Legislature's determination to deregulate the distribution of sexually related matter to Iowa adults sets the "contemporary community standards" that should have been applied by the District Court and jury in measuring "obscenity." That legislative determination precludes any finding that the materials distributed were "obscene."

This Court has expressly rejected "national" standards and established that "obscenity" is defined by the "contemporary community standards" of the community in which the distribution takes place. The Court has further declared that the contents of the community's standards can be determined by the state legislature. In setting those standards, the Court recognized the power of the state legislature to deregulate "obscenity" and foreclose any restraints on the *intrastate* distribution of sexually related materials.

Congress has never provided a definition of "obscenity" for 18 U.S.C. § 1461. This Court, to flesh out that statute, has explicitly extended the "contemporary community standards" test to 18 U.S.C. § 1461 prosecutions, designating the forum district as the geographic community. Here, the appropriate community was the Southern District of Iowa, a vicinage for which the "contemporary community standards" had been declared by the Iowa Legislature to preclude Jerry Lee Smith's prosecution for distributing sexually related materials to soliciting Iowa adults.

The District Court, however, permitted the individual jurors to disregard their state legislature's determination and convict Jerry Lee Smith based on their own views of what is "obscene" for Iowa adults. The Court of Appeals affirmed, relying on the notion that "[t]he fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within the state approve of the permitted conduct." That astounding assertion affronts the political structure of our democratic republic. Under our system, the power to declare the values that govern all citizens is delegated by the people to their elected representatives, subject only to the restraints of the ballot box. Thus, a statute is the ultimate statement of public policy—of the views of the people. As definitively stated by James Madison in *Federalist* No. 10:

> "The effect of [a republic is] to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."

At its essence, ours is a nation of laws, not men. Individual jurors are not free to rewrite the law based on a disagreement with their legislature's policy judgments, particularly in an area as emotional and constitutionally sensitive as "obscenity." This Court, recognizing the elusiveness of the legal concept of "obscenity," has rejected the notion that jurors have untrammelled discretion to determine what is "obscene." The Court has, therefore, directed that jurors be instructed on the law governing "obscenity." Here, the applicable law was declared by the jurors' own legislature, and that declaration was binding upon them.

The conclusive effect of the Iowa Legislature's statutory pronouncement is further compelled by the principles of cooperative federalism. As this Court has recognized, "obscenity" is a matter of traditional state, not federal, interest. Congress has not federalized "obscenity"; indeed, it has not even defined the term,

despite repeated reenactments of 18 U.S.C. § 1461. Rather, Congress has left the issue for determination by the Court.

This Court has rejected any need for national uniformity and adopted the community's standards of "obscenity" for purposes of 18 U.S.C. § 1461 prosecutions. The Court's incorporation of state "obscenity" law is consistent with this Court's historical practice of resorting to state law to flesh out the details of Congressional enactments. Deference to state law is especially proper where, as here, the interests involved are inherently local in character.

The Court of Appeals, in allowing the jurors to determine what community standards apply, effectively nullified Iowa law. Yet, under basic federalist precepts, federal supremacy exists only where Congress has clearly so ordained or the subject matter is intrinsically federal. Neither situation is present here. This was a wholly *intrastate* distribution; therefore, the exercise of federal supremacy is inconsistent with Jerry Lee Smith's legitimate expectation that his *intra*-Iowa distribution of sexually related materials to soliciting adults was governed by Iowa law.

This Court has recognized the need to harmonize state and federal statutory schemes. The tension between Iowa's deregulation of "obscenity" and Jerry Lee Smith's prosecution under 18 U.S.C. § 1461 for that *intra*-Iowa mailing is resolved by the adoption of Iowa law as the "contemporary community standards" for measuring "obscenity."

II.

The Court of Appeals' ruling that Jerry Lee Smith could not legitimately rely on state law in making an *intrastate* distribution of sexually related matter renders 18 U.S.C. § 1461 unconstitutionally vague, and, therefore, void as applied.

This Court had directed Jerry Lee Smith to measure his conduct in distributing sexually related matter by "contemporary community standards." Logically, then, Jerry Lee Smith must look to Iowa law to guide his conduct within Iowa. The record in this case reveals that hard core pornographic material was readily available for over-the-counter purchase throughout Iowa as permitted by Iowa law. Yet, despite the Government's failure to offer any evidence of a different community standard, the Court of Appeals ruled that the jurors could disregard these facts in convicting Jerry Lee Smith for a distribution in Iowa.

If state law can be ignored, how could Jerry Lee Smith determine the applicable community standards? Consultation with an expert has been declared of no value by this Court; a survey of community attitudes can be declared inadmissible; Jerry Lee Smith's own belief in the "nonobscenity" of the materials is legally irrelevant. In the final analysis, Jerry Lee Smith was prosecuted and sentenced to prison under unascertainable standards. He could not know that his *intra*-Iowa distribution of sexually related matter would result in incarceration until the jury issued its verdict at his criminal trial.

Hence, as applied by the Court of Appeals in this case, 18 U.S.C. § 1461 contravenes the essential due process requirement of fair notice. The absence of ascertainable standards makes the statute susceptible to arbitrary enforcement by prosecutors and capricious application by jurors. Given the dim and uncertain line between "obscenity" and protected speech, the conviction of Jerry Lee Smith for conduct lawful under Iowa law, if allowed to stand, will chill First Amendment rights.

III.

"Obscenity" is an emotional subject. Juror bias can be deeply engrained. Recognizing this fact and the obligation of the jurors in his 18 U.S.C. § 1461 prosecution to measure the "obscenity" of materials by the "contemporary community standards" in Iowa, Jerry Lee Smith requested the District Court on *voir dire* to determine whether the prospective jurors had any knowledge of those standards. The District Court refused to make such

inquiries, and the Court of Appeals affirmed. Those rulings deprived Jerry Lee Smith of his Sixth Amendment and due process rights to a competent, qualified and impartial jury.

Voir dire inquiry into prospective juror knowledge of the "contemporary community standards" is necessary to assure that the individual jurors are competent and qualified to make the objective determination required of them. Otherwise, an individual could be—as Jerry Lee Smith was—convicted through a verdict of "obscenity" based on the jurors' personal biases, rather than the community's standards.

ARGUMENT.

I.

THE "CONTEMPORARY COMMUNITY STANDARDS" IN IOWA ESTABLISHED BY THE STATE LEGISLATURE WERE IMPROPERLY DISREGARDED.

This case concerns the refusal of the courts below to require jurors to apply the "contemporary community standards" established by their state legislature as the test for measuring "obscenity" for a wholly *intra*-Iowa distribution of allegedly "obscene" materials. The Iowa Legislature declared that "contemporary community standards" in that state do not restrain the distribution of sexually related matter to consenting adults. Yet the courts below permitted the jurors to disregard their state's law and apply a subjectively devined "federal" standard to convict petitioner Jerry Lee Smith for mailing allegedly "obscene" materials to soliciting Iowa adults.

The District Court refused to acquit Jerry Lee Smith, and refused to instruct the jurors to acquit based on the existence of the Iowa law, notwithstanding the Goverment's failure to offer any evidence of a community standard in the Southern District of Iowa different from that established by the Iowa Legislature. Instead, the District Court allowed the jurors to legislate their own views of the community standards governing what is "obscene" in Iowa.

These rulings affirmed by the Court of Appeals constitute reversible error. Fundamental principles of our federalist system, binding on this Court, require that the Iowa Legislature's decision to deregulate the distribution of sexually related matter to consenting adults in Iowa must be applied by a federal court and jury in a prosecution under 18 U.S.C. § 1461 for an *intrastate* mailing of allegedly "obscene" materials to soliciting

adults. The Iowa law established the "contemporary community standards" against which the "obscenity" of the materials must be measured, and that law precludes any finding that the materials are "obscene."

A. A State Legislature Has the Power to Establish the "Contemporary Community Standards" Within Its Borders.

This Court has established the "contemporary community standards" test as the central element of the legal definition of "obscenity." In *Miller* v. *California,* 413 U.S. 15 (1973), the Court mandated that "obscenity" be judged with reference to the "contemporary community standards" of the "average person" in the community.

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

In establishing "contemporary community standards" as a substantive element of the legal definition of "obscenity," this Court held that the content of those "standards" is determined by the community itself. Thus, the Court expressly rejected a national standard in *Miller. Id.* at 32-33.

The Court recognized that the parameters of the "contemporary community standards" can be set by the state legislature. *Miller* ruled that California "could constitutionally proscribe obscenity in terms of a 'statewide' standard." *Hamling* v. *United States,* 418 U.S. 87, 105 (1974), clarifying *Miller* v. *California, supra.* In *Jenkins* v. *Georgia,* 418 U.S. 153, 157 (1974), the Court emphasized that "the States have considerable latitude

in framing statutes under [the "contemporary community standards"] element of the *Miller* decision." Indeed, the Court affirmed the right of a state legislature to preclude any more localized community standards, declaring that a state "may choose to define the standards in . . . precise geographic terms, as was done by California [using a statewide "community"] in *Miller." Id.*

Here, the Iowa Legislature explicitly legislated that the "contemporary community standards" of Iowa permit the distribution of sexually related materials to consenting adults. It further declared that its determination foreclosed any prohibition on such distributions by any "other governmental unit within this state." Iowa Code Ann. § 725.9. (A. 50.) In so doing, the Iowa Legislature followed a course specifically charted by this Court.

In *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 64 (1973), the Court expressly recognized the right of state legislatures to legalize the distribution of "obscenity."

> "The States, of course, may follow . . . a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer . . . ."

See *Memoirs* v. *Massachusetts,* 383 U.S. 413, 462 (1966) (White, J., dissenting). Indeed, *Miller* rejected the "national" standards test because, *inter alia,* a "local" standard would allow a state to apply a more permissive test.

> "The use of 'national' standards . . . necessarily implies that material found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." 413 U.S. at 32 n.13.

In *United States* v. *Reidel,* 402 U.S. 351, 357 (1971), the Court even suggested that such an approach may be the most "desirable."

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may ap-

peal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances."

B. The Iowa Legislature's Determination of the "Contemporary Community Standards" Within Its Borders Binds All Jurors, State and Federal.

Hamling v. *United States* expressly extended the "contemporary community standards" test to federal prosecutions under 18 U.S.C. § 1461:

"In *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973), a federal obscenity case decided with *Miller*, we said:

'We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller* v. *California, ante*, at 23-25. These standards are applicable to federal legislation.' *Id.*, at 129-130.

Included in the pages referred to in *Miller* is the standard of 'the average person, applying contemporary community standards.' In view of our holding in *12 200-ft. Reels of Film*, we hold that 18 U.S.C. § 1461 incorporates this test in defining obscenity." 418 U.S. at 105.

That the test does not vary between federal and state prosecutions is clear from *Miller* v. *California*. In summarizing the *Miller* holding, the Court stated:

"[O]bscenity is to be determined by applying 'contemporary community standards,' see *Kois* v. *Wisconsin*, [408 U.S. 229 (1972) (per curiam)] *supra*, at 230, and *Roth* v. *United States*, [354 U.S. 476 (1957)] *supra*, at 489, not 'national standards.'" 413 U.S. at 37.

The citation of both *Kois*, a state case, and *Roth*, a federal case, confirms that the same "contemporary community standards" should be applied in federal as well as state prosecutions.

The Court in *Hamling* determined that the geographic dimensions of the appropriate "community" for that federal prosecution were equivalent to the Southern District of California. 418 U.S. at 105-06. Accordingly, the appropriate "community" for this case was the Southern District of Iowa, a "vicinage" whose standards had been determined by the Iowa Legislature to preclude criminal prosecution for the distribution of sexually related materials to consenting adults. As Professor Schauer recently stated:

"In a federal prosecution under local standards, pursuant to *Hamling*, state statutes may be relevant evidence of community standards. If the state law of the relevant community does not make 'obscenity' a crime, or perhaps only includes minors, then the law, theoretically embodying the wishes of the community, should be probative as to the standards of the community. If the community does not make the activity a crime, it can be said that it does not offend the community. Under the proper circumstances, legislative history may also be admissible on the relationship between the statute and the standards or wishes of the state. Municipal ordinances may also be relevant, as would evidence of a consistent and explicit policy of nonenforcement, even though the statutes nominally exist." F. Schauer, The Law of Obscenity 134 (1976) (footnotes omitted).

Nonetheless, the Court of Appeals held that Iowa's legislative determination could be disregarded by federal jurors. It asserted:

"[S]tate policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do." (A. 46.)

Yet that statement is inconsistent with basic precepts of federalism and the essential character of our representative form of government, and with this Court's deliberate denationalization of "obscenity" and its express recognition of the right of a state to establish the governing "contemporary community standards" applicable to distributions within its borders.

C. Fundamental Federalist Principles Confirm the Propriety of Utilizing State Determined Community Standards in Federal "Obscenity" Prosecutions.

1. Jurors Cannot Rewrite the Law.

The Court of Appeals' decision relied on the notion that "[t]he fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within the state approve of the permitted conduct." *United States* v. *Danley*, 523 F.2d 369, 370 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1143 (1976). This astounding statement is repugnant to the political structure of a democratic republic. The legislature in a democratic republic is institutionally the voice of the people, subject to the political restraints inherent in the ballot box. James Madison in *Federalist* No. 10 definitively stated this proposition:

> "[W]hat are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? . . . [T]he most numerous party, or in other words, the most powerful faction must be expected to prevail.
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> * * * * *
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> "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society;

> but it will be unable to execute and mask its violence under the forms of the Constitution.
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> * * * * *
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> "The effect of [a republic is] to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose." *The Federalist* No. 10, at 79-82 (C. Rossiter ed. 1961) (J. Madison).

Mr. Chief Justice Warren, in the signal case of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), underscored these principles in upholding the "one-man, one-vote" concept:

> "State legislatures are, historically, the fountainhead of representative government in this country. . . . [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . .
>
> "Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. *Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.*" *Id.* at 564-65 (emphasis added).

The duly elected representatives of the people of Iowa in an unequivocable statement of public policy declared that statewide community standards permit the unfettered distribution of

sexually related materials between consenting adults. It is incomprehensible how twelve jurors—selected at random, not elected by their peers—can be claimed to be a better reflection of the community than their elected representatives. Mr. Justice Harlan, in *Mugler* v. *Kansas*, 123 U.S. 623, 660-61 (1887), stated:

> "Power to determine [questions of public morals, safety and health], so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government."

Under our system, a statute is the ultimate statement of public policy—of the views of the people. As Professor Bickel pointed out:

> "Law is more than just another opinion; not because it embodies all right values, or because the values it does embody tend from time to time to reflect those of a majority or plurality, but because it is the value of values. Law is the principal institution through which a society can assert its values." A. Bickel, The Morality of Consent 5 (1975).

Cf. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 12-14 (1936).

Thus, it is firmly established that ours is a government of laws, not men. Individual jurors are not free to rewrite the law. As long ago stated by the Court in *Sparf & Hansen* v. *United States*, 156 U.S. 51, 101-03 (1895):

> "Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. . . . When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions."

Indeed, this Court itself will not question the wisdom of actions taken by the elected representatives of the people. In

expressly sanctioning the right of state legislatures to deregulate "obscenity," the Court stated:

> " 'We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch . . . social conditions.' *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965)." *Paris Adult Theatre I* v. *Slaton, supra*, 413 U.S. at 64.

See *Lochner* v. *New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

Hence, as stated in *Berman* v. *Parker*, 348 U.S. 26, 32 (1954), "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." Here, the Iowa Legislature has conclusively determined the "contemporary community standards" governing the distribution of "obscenity" within Iowa. That determination cannot be disregarded by jurors on the basis of their disagreement with their legislature's policy judgments on a matter as emotional and constitutionally sensitive as "obscenity."

The Court of Appeals cited this Court's decision in *Hamling* v. *United States* as support for ruling that federal jurors can ignore their state's law in determining "obscenity" in a federal prosecution. The Court of Appeals paraphrased *Hamling*:

> " 'A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.' " (A. 46.)[2]

But *Hamling* actually refutes the Court of Appeals' ruling.

In the first place, *Hamling* explained that the rationale for the "contemporary community standards" test was precisely to pre-

2. The actual language in *Hamling* reads:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." 418 U.S. at 105.

vent "obscenity" judgments from being based on the personal bias of individual jurors.

> "This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment [of "obscenity"] be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." 418 U.S. at 107.

Indeed, this Court has firmly rejected the notion that jurors have "unbridled discretion" in determining "obscenity." *Jenkins* v. *Georgia, supra,* 418 U.S. at 160. As stated in *Hamling* v. *United States, supra,* 418 U.S. at 118, "[t]he definition of obscenity . . . is not a question of fact, but one of law; the word 'obscene,' as used in 18 U. S. C. § 1461, is not merely a generic or descriptive term, but a legal term of art." Consequently, this Court has directed that jurors considering "obscenity" be "guided always by limiting instructions on the law." *Miller* v. *California, supra,* 413 U.S. at 30. Here, the governing *law* made nothing "obscene" for consenting adults in Iowa, and it was, therefore, the duty of the District Court so to instruct the jury.

Second, the statement in *Hamling,* relied on by the Court of Appeals, was made in the context of an 18 U.S.C. § 1461 prosecution for unsolicited, *interstate* distributions of allegedly "obscene" materials. California, the state of origin and the forum state, had adopted a statewide community standard of prohibiting the distribution of explicit sexually oriented materials to California adults. The Court did not indicate what "contemporary community standards" applied; it simply noted:

> "Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw. But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide." 418 U.S. at 105-06.

At least as to California's community standards, there was no conflict between an 18 U.S.C. § 1461 prosecution and California law. Therefore, *Hamling* did not present the situation at bar, where the state legislature has declared that nothing could be "obscene" under the prevailing "contemporary community standards."

2. Under Federalist Principles, Potential Conflicts Between Federal and State Law Are Properly Reconciled by Deference to State Law in Matters of Local Concern.

The potential conflict between Iowa's decision to deregulate the distribution of sexually related material within its borders and a prosecution under 18 U.S.C. § 1461 for an *intra*-Iowa mailing is properly reconciled by deference to Iowa law. In the spirit of cooperative federalism, this Court has often turned to state law to flesh out the details of Congressional enactments. As stated in *DeSylva* v. *Ballentine,* 351 U.S. 570, 580 (1965):

> "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law."

There, state law was used to determine the eligibility of an illegitimate child to a renewal right under the Federal Copyright Act.

Adoption of state law is especially appropriate where the interests are predominantly local in character. As noted in *Cooley* v. *Board of Wardens,* 53 U.S. (12 How.) 299, 320 (1851), some subjects are "such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."

3. "Obscenity" Is a Matter of State, Not Federal, Interest.

This Court has recognized that the regulation of "obscenity" is predominately a matter of state, not federal, interest. The interests in regulating "obscenity" were defined by the Court in *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 57-58.

> "[W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests 'other than those of the advocates are involved.' *Breard* v. *Alexandria,* 341 U.S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." [Footnote omitted.]

These interests are the traditional province of the individual states reserved to them by the Tenth Amendment. As stated in *Miller* v. *California, supra,* 413 U.S. at 29:

> "Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power [over "obscenity"] reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day."

No independent federal interests have ever been identified by Congress or this Court. Indeed, Mr. Justice Harlan contended that any interests of the federal government are attenuated and subservient to its primary obligation to assure adequate protection of First Amendment rights.

> "[T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric. . . .

> "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do." *Roth* v. *United States,* 354 U.S. 476, 504-05 (1957) (Harlan, J., concurring and dissenting).[3]

Notably, in *Miller,* the Court recognized that the exercise of state authority over the distribution of sexually related materials within a state would offend no federal interests, especially given the traditional local interests at stake.

> "[T]he application of domestic state police powers in this case did not intrude on any congressional powers under Art. 1, § 8, cl. 3, for there is no indication that appellant's materials were ever distributed interstate. Appellant's argument would appear without substance in any event. Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines." 413 U.S. at 32-33 n.13.

In making this statement, the Court referred back to its first footnote, where the Court had expressly stated that the California statute at issue there did not "create any 'direct, immediate burden on the performance of the postal functions. . . .'" *Id.* at 17-18 n.1. Here, the distributions for which petitioner was sentenced to prison were all *intrastate.*

The Court of Appeals' reliance upon the "controll[ing]" (A. 46) decisions of *United States* v. *Hill,* 500 F.2d 733 (5th Cir. 1974), *cert. denied,* 420 U. S. 952 (1975), and *United States*

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3. Mr. Justice Harlan in *Memoirs* v. *Massachusetts,* 383 U.S. 413, 457 (1966) (dissenting opinion), noted "a limited [federal] interest" in excluding hard core pornography from the mails. He identified that interest in terms of preventing the "thwarting of state regulation." *Id.* at 457-58 n.2. But in this case, because Iowa has deregulated the distribution of "obscenity" to consenting adults in that state, an assertion of a federal interest would effectively *thwart* Iowa law.

v. *Danley, supra,* is, thus, misplaced. These cases concerned *interstate* distributions.

Hill involved a prosecution under 18 U.S.C. §§ 1462 and 1465 for *interstate* distribution of allegedly "obscene" materials by common carrier. Prior to this prosecution, a three-judge federal court ruled Florida's statutory scheme regulating "obscenity" invalid for procedural defects. *Meyer* v. *Austin,* 319 F. Supp. 457 (M.D. Fla. 1970), *appeal dismissed,* 413 U.S. 902 (1973). Consequently, Florida had no "obscenity" statute in effect during the *Hill* prosecution. The Fifth Circuit Court of Appeals affirmed the District Court's refusal to instruct the jury that, as a result, nothing could be "obscene" in Florida. That ruling was correct. The Florida Legislature had expressed a policy that community standards required the control of "obscenity." That the enactment was procedurally defective, hence, invalid, did not void the policy statement.

Danley, another federal prosecution under 18 U.S.C. §§ 1462 and 1465, also involved *interstate* shipments of allegedly "obscene" materials. Oregon, where the shipments originated, had deregulated the distribution of "obscenity" within its borders. In rejecting the argument that it was bound by the policy of Oregon, the Court observed:

> "In judging the community standard, the court, dealing as it was with laws regulating the mails and interstate commerce, properly considered the community as embracing more than the State of Oregon. While under *Miller* v. *California, supra,* taken in conjunction with *United States* v. *12 200-Ft. Reels of Super 8 MM. Film,* 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), it is permissible in federal prosecution to define the state as a community, it is clear from *Hamling* v. *United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), that consideration may be given to standards without the state." 523 F.2d at 370.

That analysis may be proper in the context of an *interstate* distribution, but it has no application for the purely *intrastate* conduct involved in this case.

4. The Absence of Any Definition of "Obscenity" as Used in 18 U.S.C. § 1461 Requires Resort to State Law.

The statute here at issue, 18 U.S.C. § 1461, does not even provide a definition of "obscenity," and contains no expression of the controlling community standard. Congressional silence on the appropriate standards for defining "obscenity" itself creates a presumption in favor of the adoption of state law. For example, in the securities law area, federal courts have looked to the forum state to obtain the statute of limitations for suits brought under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b), which is silent on the point. The premise for this procedure is stated in *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395 (1946).

> "As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. [Cites omitted.] The implied absorption of State statutes of limitations within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles."

In the tort area, the Court looked to state law for a definition of the term "next of kin" used in the Federal Employer's Liability Act.

> "Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law." *Seaboard Air Line Railway* v. *Kenney,* 240 U.S. 489, 493-94 (1916).

In *Board of County Commissioners* v. *United States,* 308 U.S. 343 (1939), state law was applied in determining whether

a judgment for the United States in an action to recover taxes illegally exacted from an Indian should include interest. The federal statute did not resolve the issue. Mr. Justice Frankfurter reasoned:

> "Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, . . . Congress has left us free to take into account appropriate considerations of 'public convenience.' . . . Nothing seems to us more appropriate than due regard for local institutions and local interests." *Id.* at 351.

In *Reconstruction Finance Corp.* v. *Beaver County,* 328 U.S. 204 (1946), the Court adopted the state law definition of real property because Congress, in enacting the federal taxation statute at issue there, did not define that concept.

Similarly, Congress has not defined "obscenity" here. Indeed, the substantive content of 18 U.S.C. § 1461 is exclusively determined by this Court's recent rulings in *United States* v. *12 200-ft. Reels of Film,* 413 U.S. 123 (1973), and *Hamling* v. *United States, supra.* Recognizing the chameleon quality of "obscenity," this Court has adopted the community's standards of "obscenity" for purposes of an 18 U.S.C. § 1461 prosecution. Resort to Iowa law is, therefore, proper.

5. Disregarding Chapter 725 of the Iowa Code Effectively Nullifies State Law in the Absence of Any Congressional Intent to Federalize "Obscenity."

In *Wheeler* v. *Barrera,* 417 U.S. 402 (1974), this Court rejected the facile argument adopted by the Court of Appeals below, that the "prosecution deals with a federal statute and state law has no bearing on its decision." (A. 46.) The Court, in *Barrera,* held that state law should control certain school funding issues under the Elementary and Secondary Education Act, stating:

> "By characterizing the problem as one involving 'federal' and not 'state' funds, and then concluding that federal law governs, the Court of Appeals, we feel, in effect nullified the Act's policy of accommodating state law." *Id.* at 419.

Here, the effect of the Court of Appeals' ruling was to nullify Chapter 725 of the Iowa Code. Yet *Schwartz* v. *Texas,* 344 U.S. 199, 202-03 (1952), instructed that "[t]he exercise of federal supremacy is not lightly to be presumed." That instruction is premised on the essential relationship between federal and state law that has been well-described in H. Hart & H. Wechsler, The Federal Courts and the Federal System 470-71 (2d ed. 1973):

> "Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation."

See Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489 (1954).

This Court has ruled that federal law will not be deemed preemptive of state law absent a clear statement of Congressional intent or an inherently federal subject matter. As stated in *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963):

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the ab-

> sence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

This firm commitment to federalism has been reaffirmed in this Court's recent decisions. See, *e.g., National League of Cities* v. *Usery*, 96 S. Ct. 2465 (1976); *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117 (1973); *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Goldstein* v. *California*, 412 U.S. 546 (1973). See also Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623 (1975).

Congress has been silent regarding any desire to federalize "obscenity." Indeed, Congress has never established a definition of "obscenity" or specified the governing "contemporary community standards" for measuring that concept despite repeated reenactments of 18 U.S.C. § 1461.[4] Rather, Congress has left the issue for determination by the Court.

6. This Court Has Rejected Any Need for National Uniformity in the "Obscenity" Area.

In the absence of any contrary Congressional expression, this Court has eschewed any need or desire for national uniformity in the "obscenity" area.

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. [Cites omitted.] People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism

4. See Act of June 8, 1872, 17 Stat. 283, 302; Act of March 3, 1873, 17 Stat. 598, 599; Act of July 12, 1876, 19 Stat. 90; Act of Sept. 26, 1888, 25 Stat. 496; Act of May 27, 1908, 35 Stat. 416; Act of March 4, 1909, 35 Stat. 1088, 1129; Act of March 4, 1911, 36 Stat. 1327, 1339; Act of June 25, 1948, 62 Stat. 683, 768; Act of June 28, 1955, 69 Stat. 183; Act of Aug. 28, 1958, 72 Stat. 962; Act of Jan. 8, 1971, 84 Stat. 1973, 1974.

> of imposed uniformity." *Miller* v. *California, supra,* 413 U.S. at 32-33 (footnote omitted).

The genius of federalism is precisely the ability of each state individually to tailor a social environment for its citizenry. In fashioning the fabric of this environment, the state is free to experiment with differing philosophies toward "obscenity." As Mr. Justice Harlan stated:

> "It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. 'State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.' Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nationwide suppression of the book, and so long as other States are free to experiment with the same or bolder books." *Roth* v. *United States, supra,* 354 U.S. at 505-06 (Harlan, J., concurring and dissenting) (footnotes omitted).

Mr. Justice Stevens recently emphasized the need to permit communities to "experiment with solutions to admittedly serious problems," such as "obscenity" regulation. *Young* v. *American Mini Theatres, Inc.*, 96 S. Ct. 2440, 2453 (1976).

Congress has expressed no desire for federal supremacy over "obscenity"; this Court has rejected any need for national uniformity. The effective nullification of Iowa law by the Court of Appeals is, therefore, particularly unjustifiable. In *Goldstein* v. *California, supra,* the Court refused to hold that California's prohibition on record piracy was preempted by federal copyright law. The Court emphasized the traditional role of the states in promoting "those portions of science and the arts which were

of local importance," 412 U.S. at 557, and concluded that the limited national interests involved did not conflict with the divergent interests of citizens in different parts of the country. The Court stated:

> "No conflict will necessarily arise from a lack of uniform state regulation, nor will the interest of one State be significantly prejudiced by the actions of another." *Id.* at 560.

7. An Individual Should Receive Uniform Treatment in the State of His Residence.

Simple justice commands that an individual's daily conduct in the state in which he resides should be subject to a uniform body of laws. The same act should not be governed by two different standards—one state, one federal. This common sense reasoning was recently applied in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra.*

Ware concerned a claim of a forfeiture by the respondent of benefits in a noncontributory profit-sharing plan under the terms of an employment agreement. Petitioner Merrill Lynch argued that a New York Stock Exchange Rule, enacted pursuant to section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(f), directing arbitration of any controversy arising from employment terminations, preempted two California state statutes. The first California statute voided the employment agreement for including a noncompetition clause; the second required that arbitration clauses be disregarded in individual actions for the collection of wages. The Court refused to nullify the state laws, stressing California's "strong policy of protecting its wage earners." 414 U.S. at 139.

In reaching its decision, the Court recognized that "the individual's expectation of uniform treatment in the State of his residence" must not be "sacrifice[d]." *Id.* at 138; cf. *Erie Railroad* v. *Tompkins,* 304 U.S. 64 (1938) and its progeny. Otherwise, an individual is incapable of planning his daily affairs.

> "Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law'. . . ." *Klaxon Co.* v. *Stentor Electric Manufacturing Co.,* 313 U.S. 487, 496 (1941).

See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 194 (tent. ed. 1958).

Here, petitioner Jerry Lee Smith could legitimately expect that his distribution of materials to soliciting adults in Iowa was governed by Chapter 725 of the Iowa Code. Yet for this logical expectation Jerry Lee Smith is being imprisoned.

8. Any Potential Conflict Between Chapter 725 of the Iowa Code and 18 U.S.C. § 1461 Is Harmonized by the Adoption of the Iowa Legislature's Declaration of "Contemporary Community Standards."

In *Ware,* the Court, relying on the analytical framework in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), also emphasized the need to harmonize federal and state statutes.

> "Our analysis is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' [*Silver* v. *New York Stock Exchange, supra*] at 357." 414 U.S. at 127.

In analyzing the "tension," *Miller* v. *California, supra,* 413 U.S. at 29, between Chapter 725 of the Iowa Code and Jerry Lee Smith's 18 U.S.C. § 1461 prosecution, a federal court must adhere to the wisdom of *United States* v. *Bass,* 404 U.S. 336, 347-48 (1971):

> "First, as we have recently reaffirmed, 'ambiguity concerning the ambit of [federal] criminal statutes should be

resolved in favor of lenity.' . . . In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' . . . This principle is founded on two policies that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' . . . Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."

The Congressional decision not to define "obscenity," the lack of any need for national conformity, the predominate state interests at stake and Jerry Lee Smith's legitimate expectations that he would receive uniform treatment within his state of residence, all dictate that any potential conflict between Iowa's deregulation of the distribution of sexually related matter and a federal prosecution for a purely *intra*-Iowa mailing of allegedly "obscene" material is resolved by the adoption of Iowa law as the governing "contemporary community standards."

II.

18 U.S.C. § 1461 IS UNCONSTITUTIONALLY VAGUE AS APPLIED IN THIS CASE.

The ruling below—that federal jurors, in an 18 U.S.C. § 1461 prosecution, can disregard state law and themselves determine what community standards apply and what the dimensions of those standards are—not only offends our federalist

system, but also renders that statute unconstitutionally vague, and, therefore, void. Vague laws fail to provide the public with fair notice of what is prohibited; they affront due process. Such laws are subject to arbitrary enforcement and application, and necessarily infringe upon the exercise of protected rights. *Hynes* v. *Mayor & Council*, 96 S. Ct. 1755 (1976); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); *United States* v. *Harriss*, 347 U.S. 612 (1954); *Winters* v. *New York*, 333 U.S. 507 (1948); see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). As stated in *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972):

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matter to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [Footnotes omitted.]

The line between protected speech and "obscenity" is "finely drawn," *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), indeed, "elusive," *Stanley* v. *Georgia*, 394 U.S. 557, 566 (1969). Consequently, "obscenity" statutes, like 18 U.S.C. § 1461, are strictly construed. See, *e.g.*, *Rabe* v. *Washington*, 405 U.S. 313 (1972) (per curiam); *Interstate Circuit, Inc.* v. *City of*

Dallas, 390 U.S. 676 (1968); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). As recently stated in *Hynes* v. *Mayor & Council, supra,* 96 S. Ct. at 1760:

> "The general test of vagueness applies with particular force in review of laws dealing with speech. '[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' *Smith* v. *California,* 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205, 210 (1959)."

Under the Court of Appeals' interpretation of 18 U.S.C. § 1461, the petitioner Jerry Lee Smith could not have foreseen that his conduct would lead to imprisonment. *Miller* and *Hamling* directed Jerry Lee Smith to measure "obscenity" by "contemporary community standards." Logically, Jerry Lee Smith must look to Iowa law to guide his conduct within Iowa. Yet the Court of Appeals ignored that logic in permitting the individual jurors to disregard their state's law in determining "obscenity."

If state law can be disregarded, how could Jerry Lee Smith determine the standards of the community? Expert testimony of the prevailing "contemporary community standards" need not be considered by the jurors, *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 56 n.6; hence, consultation with an expert would be of no value. A survey of community attitudes would be useless; it may be deemed inadmissible or disregarded by the jury. Cf. *Hamling* v. *United States, supra,* 418 U. S. at 108-10. Of course, Jerry Lee Smith's own belief in the "nonobscenity" of the materials is legally irrelevant; *Hamling* held that " 'knowledge of the character of the materials' " is a sufficient basis for a criminal conviction. *Id.* at 119-20.

Consequently, Jerry Lee Smith was subjected to prosecution and imprisonment under unascertainable standards. He could not know whether his distributions would result in a prison sentence until the jury rendered its verdict at his criminal trial.

Jerry Lee Smith was incarcerated for conduct wholly legal under state law. Such a result is the antithesis of due process.

Even appellate review of the jury's verdict is effectively precluded as the "contemporary community standards" applied can never be known. The Court of Appeals in this case held itself "bound by the jury decision." (A. 46.) Yet what standards were applied? What evidence is there in the record that Jerry Lee Smith distributed materials "obscene" under the prevailing "contemporary community standards" of the "average person" in Iowa? The Government offered no evidence of any standards. The subjective, totally discretionary views of twelve jurors stand alone against the "contemporary community standards" declared by their own legislature in Chapter 725 of the Iowa Code and the ready and lawful availability within their community of comparable materials.

Under the Court of Appeals' ruling, a prosecutor is not restrained by any standards. Therefore, 18 U.S.C. § 1461 is subject to arbitrary enforcement and application at the whim of the local prosecutor. *Hynes* v. *Mayor & Council, supra,* 96 S. Ct. at 1761. Thus, the statute is just as susceptible to abuse as the vagrancy law struck down in *Papachristou* v. *City of Jacksonville, supra,* or the political door-to-door canvassing and solicitation ordinance declared invalid for vagueness in *Hynes.*

Moreover, the Court of Appeals' interpretation necessarily chills the exercise of First Amendment rights. See, *e.g.,* Amici Curiae Brief of the American Library Association and the Iowa Library Association in Support of Petitioner. Thus, 18 U.S.C. § 1461, as interpreted by the Court of Appeals, manifests all the evils that the void for vagueness doctrine is designed to eradicate and, as a result, the statute must be declared invalid as applied to petitioner Jerry Lee Smith.

III.

THE DENIAL OF VOIR DIRE QUESTIONS ON "CONTEMPORARY COMMUNITY STANDARDS" DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

A. The Right to a Competent, Qualified and Impartial Jury Is Guaranteed by the Sixth Amendment and by Due Process of Law.

Petitioner submitted questions for the prospective jurors at *voir dire* to elicit their knowledge of "contemporary community standards" on what materials, taken as a whole, are "obscene" for adults in Iowa.[5] The Court of Appeals affirmed the District Court's refusal to permit these questions. Those rulings deprived Jerry Lee Smith of his Sixth Amendment and due process rights to trial by a competent, qualified and impartial jury. *Witherspoon* v. *Illinois,* 391 U.S. 510, 518 (1968); *Irvin* v. *Dowd,* 366 U.S. 717, 722-23 (1961); *Morford* v. *United States,* 339 U.S. 258 (1950) (per curiam); *Dennis* v. *United States,* 339 U.S. 162, 168 (1950); *United States* v. *Wood,* 299 U.S. 123, 133-34 (1936); see Note, *Exploring Racial Prejudice on Voir Dire: Constitutional Requirements and Policy Considerations,* 54 B.U.L. Rev. 394, 395-98 (1974).

This constitutional guarantee requires a thorough *voir dire.* Mr. Chief Justice Marshall, in *Mima Queen & Child* v. *Hepburn,* 11 U.S. (7 Cranch) 290 (1813), a suit to prove the petitioners' status as free persons, upheld the exclusion of a juror when the *voir dire* revealed his strong antislavery views. The Chief Justice stated:

> "[Jurors] ought to be superior to every exception, they out to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way . . . ." *Id.* at 297-98.

The landmark case of *Aldridge* v. *United States,* 283 U.S. 308 (1931), established the right at *voir dire* to inquire into the racial prejudice of prospective jurors. The Court in *Aldridge* reversed a murder conviction because the trial judge refused the *voir dire* questions propounded by the defendant. *Ham* v. *South Carolina,* 409 U.S. 524 (1973), reaffirmed *Aldridge,* finding that the right to appropriate *voir dire* inquiry derives from "the essential fairness required by the Due Process Clause." *Id.* at 527.

The scope of the *voir dire* in federal cases extends to areas beyond racial prejudice. Thus, in *Morford* v. *United States, supra,* 339 U.S. at 259, *Dennis* v. *United States, supra,* 339 U.S. at 168, and *Connors* v. *United States,* 158 U.S. 408, 413 (1895), this Court held that a defendant has the right to inquire into political prejudices. The Circuit Courts have reversed convictions for refusal to make *voir dire* inquires into prospective jurors' attitudes toward (1) the presumption of innocence, *United States* v. *Blount,* 479 F.2d 650 (6th Cir. 1973), (2) dissent, public protest, alternate life styles and confrontation with police, *United States* v. *Dellinger,* 472 F.2d 340, 366-70 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973), (3) purposeful lying and private investigators, *United States* v. *Napoleone,* 349 F.2d 350, 352-54 (3d Cir. 1965), and (4) bookmaking and illegal gambling, *Lurding* v. *United States,* 179 F.2d 419 (6th Cir. 1950).

5. These questions were as follows:

> "Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?
>
> "(The following individual questions are requested for each juror who answers the above question in the affirmative.)
>
> "Where did you acquire such information?
>
> "State what your understanding of those contemporary community standards are?
>
> "In arriving at this understanding, did you take into consideration the laws of the State of Iowa which regulate obscenity?
>
> "State what your understanding of those laws are?" (A. 8.)

In *Brown* v. *United States*, 338 F.2d 543 (D.C. Cir. 1964), an opinion by Mr. Chief Justice Burger while a circuit judge, a conviction for assault with intent to commit robbery was overturned because the trial court had refused the defendant's request at *voir dire* to inquire whether any juror would " 'give greater credence to the testimony of a law enforcement officer merely because he is an officer as compared to any other witness.' "[6]

B. Petitioner's Voir Dire Questions Were Proper and Essential to Assure a Competent, Qualified and Impartial Jury.

The Court's adoption of the "contemporary community standards" test for "obscenity" requires the *voir dire* requested by petitioner. The "contemporary community standards" concept of *Miller* and *Hamling* is plainly an objective, legal test. *Hamling* v. *United States, supra*, 418 U.S. at 107. A juror is not to apply his own subjective reactions to the materials at issue; he must determine the nature of these materials from the viewpoint of "the average person" in his community. *Id.* at 104-05. Hence, as recognized in *Hamling*, it is essential that jurors have

6. Other cases in the Circuit Courts which endorse broad ranging *voir dire* include: *United States* v. *Robinson*, 475 F.2d 376, 390 (D.C. Cir. 1973) (endorsing inquiry into juror attitude toward self-defense); *Kuzniak* v. *Taylor Supply Co.*, 471 F.2d 702 (6th Cir. 1972) (per curiam) (reversing judgment for defendant in diversity suit for personal injuries because trial court refused to inquire into juror attitude toward aliens); *United States* v. *Lewin*, 467 F.2d 1132 (7th Cir. 1972) (reversing conviction for voter registration tampering because trial court refused to inquire into organizational relationships); *Stephan* v. *Martin Firearms Co.*, 353 F.2d 819 (2d Cir. 1965), *cert. denied*, 384 U.S. 959 (1966) (reversing judgment for defendants in diversity suit for personal injuries involving a rifle because trial court refused to inquire into juror expertise with firearms); *United States* v. *Puff*, 211 F.2d 171 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954) (endorsing inquiry into the intensity of views for or against capital punishment); *United States* v. *Daily*, 139 F.2d 7 (7th Cir. 1944) (endorsing inquiry into religious bias); *Bailey* v. *United States*, 53 F.2d 982 (5th Cir. 1931) (reversing a conviction for smuggling liquor because of restrictive *voir dire*).

the "qualifications and competency" to make the objective determination required of them. *Id.* at 140. This requires some knowledge of "contemporary community standards." Petitioner sought only to determine whether the prospective jurors had *any* such knowledge.

"Obscenity" is an emotional subject. Potential juror bias can run deep, yet be of a type that cursory examination will not uncover. Unless a thorough *voir dire* is allowed, a jury can be impaneled with latent prejudices that can result in the subversion of protected rights. As Professor Schauer pointed out:

> "In an obscenity case, more so than in most cases, the personal political, moral, religious, and sexual opinions of the jurors are likely to affect the verdict they render. . . . [I]n few other areas of the law are jurors likely to discover that acts personally abhorrrent and shocking to them are nonetheless legally protected. The defense should be given an opportunity to know of any such personal views in advance." F. Schauer, The Law of Obscenity, *supra* at 261.

The Court of Appeals, however, cast aside petitioner's *voir dire* requests, citing the tort law's "reasonable man" rule. That analysis is misguided. The "average person" in an "obscenity" case is quite different from the "reasonable man" in tort law. Although both terms are designed to convey an objective test, the latter conceptually directs the inquiry to the *best* human qualities of judgment, prudence and care. W. Prosser, The Law of Torts § 32, at 150 (4th ed. 1971). The "average person" test for "obscenity" directs the inquiry the opposite way—to the minimum degree of human *baseness* the community tolerates. As Professor Schauer aptly states:

> "If the sexual sophistication of the reasonable man were as finely tuned as his judgment and caution, then the major justification for obscenity laws would disappear, since this 'ideal' would not be aroused by *Ulysses* or *God's Little Acre*, and would be merely bored by commercial pornography. Thus, it must be recognized that the concept of the average man in obscenity law is most likely sui generis,

> and comparisons with the 'reasonable man' of tort law, the 'average prudent man' of trust law, or similar formulations are not likely to be helpful." F. Schauer, *supra* at 73.

Certainly, the "views of the average person in the community" are not on the jurors' "tongues," nor "on their sleeves." (A. 45.) Yet that truism only emphasizes the appropriateness of petitioner's *voir dire* questions. A person gains the competence to ascertain the characteristics of caution, prudence and care of a "reasonable man" merely by living in society. But that person does not—indeed cannot—"know" the views of the "average person" in the community toward "obscenity" unless and until he both dwells in that vicinage and is aware of the general attitudes toward and laws relating to depiction of sexually related matters currently prevailing there. Nothing in the trial judge's *voir dire* probed such competency questions; petitioner's proffered questions did.

The barring of *voir dire* inquiry into prospective juror's knowledge of "contemporary community standards" augments the intrinsic vagueness of the Court of Appeals' position. What remains to insure that jurors apply the objective test for "obscenity" compelled by the law? Expert testimony, the open availability of similar materials throughout the community, indeed, even state law, can be ignored by the jurors. Clearly, Jerry Lee Smith, deprived of effective *voir dire*, had no mechanism to safeguard his right to be tried, and have the evidence weighed, according to the community's standards, rather than the jurors' personal tastes.

No jury instruction can cure incompetency or bias. An instruction cannot "educate" a juror about the prevailing "contemporary community standards" in his vicinage. *Burton* v. *United States*, 391 U.S. 123 (1968), held that instructions not to consider the confession of one defendant which inculpated the codefendant were insufficient to preserve jury impartiality. *Bruton* recognized that there are limits to the mental gymnastics that can be expected of jurors.

"Obscenity" is often indistinguishable from protected speech. *Stanley* v. *Georgia*, *supra*, 394 U. S. at 566. With First Amendment rights and Jerry Lee Smith's personal freedom at stake, there can be no tolerance of jurors incapable of being "guided . . . by limiting instructions on the law [governing "obscenity"]." *Miller* v. *California*, *supra*, 413 U. S. at 30.

CONCLUSION.

For the reasons stated herein, petitioner Jerry Lee Smith's judgment of conviction must be reversed.

Respectfully submitted,

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Dated: September 14, 1976.